STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

MARSEILLES TELEPHONE COMPANY	)	
GRAFTON TELEPHONE COMPANY	)	
	)	**Docket Nos. 04-0365**
	)	**04-0367**
Petition for suspension or modification of the	)	
Applicability of the requirement of Section	)	
251(b)(2) of the federal Telecommunications	)	
Act of 1996, 47 U.S.C. 251(b)(2), pursuant to	)	
Section 251(f)(2) of said Act; for entry of an	)	
Interim Order; and for other necessary and	)	
Appropriate relief.	)	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief in the above-captioned matters.

Staff agrees with the overall premise of Petitioners' Initial Brief that Petitioners have met their burden of proof to obtain the requested relief under Section 251(f)(2) of the federal Telecommunications Act of 1996 (the "Federal Act") based on the records in the above-captioned matters. Specifically, Staff concurs that Petitioners are entitled to relief because they have satisfied the criteria set forth in Sections 251(f)(2)(A)(i) and 251(f)(2)(B) of the Federal Act. 47 U.S.C. § 251(f)(2)(A)(i); 47 U.S.C. § 251(f)(2)(B). Put differently, it is Staff's position that Petitioners have neither put forth, nor do the records in the above-captioned proceedings contain sufficient evidence to alternatively grant Petitioners temporary suspensions under Section 251(f)(2)(A)(ii) or 251(f)(2)(A)(iii) of the Federal Act.

As a separate matter, however, Staff believes that Petitioners have exaggerated the preclusive effect of the Commission's orders in the first five wireline to wireless local number

portability ("WLNP") cases.[1] Petitioners claim that the Commission's orders in the first five WLNP cases somehow established firm "precedent" or "policy" as to what constitutes a "significant adverse economic impact on users of telecommunications services generally" and "consistent with the public interest, convenience, and necessity" under Section 251(f)(2) of the Federal Act. Petitioners' Initial Brief, at 2. Petitioners also argue that since they relied upon that Commission "precedent" or "policy" when preparing their case, the Commission could only depart from that presupposed "precedent" or "policy" when armed with new evidence, or a change in conditions or the law. Id. at 1-2, n. 3. Staff believes that Petitioners arguments are incorrect for several reasons.

First, there was no Commission "precedent" or "policy" to speak of and upon which Petitioners can claim reliance. At the time Petitioners filed their petitions,[2] no Commission "precedent" or "policy" had been set because the Commission had not even entered final orders in the first five WLNP cases. The only orders of any kind in those cases were the Proposed Orders the Administrative Law Judge filed on April 16, 2004.[3] The Commission entered final orders in those dockets on May 11, 2004, which was well after Petitioners filed Direct Testimony.[4]

As relevant statutory and case law authority reveals, proposed orders of a Commission administrative law judge are not final Commission orders because the Commission is the finder of fact. 220 ILCS 5/10-110; Continental Mobile Telephone Company, Inc. v. Illinois Commerce

[1] Egyptian Telephone Cooperative Association, Inc., ICC Docket 03-0726 (Order entered May 11, 2004); Madison Telephone Company, ICC Docket 03-0730 (same); Harrisonville Telephone Company, ICC Docket 03-0731 (same); Alhambra-Grantfork Telephone Company, ICC Docket 03-0732 (same); Home Telephone Company, ICC Docket 03-0733 (same).
[2] A review of the Commission's E-Docket System reveals that Petitioners filed their petitions on April 30, 2004.
[3] The Commission's E-Docket System reveals that the Administrative Law Judge had only filed Proposed Orders in the first WLNP dockets on April 16, 2004.
[4] The Commission's E-Docket System indicates that Petitioners filed Direct Testimony on May 4, 2004 (The Marseilles Telephone Company and Metamora Telephone Company).

Comm'n, 269 Ill. App. 3d 161, 171, 645 N.E.2d 516, 523 (1st Dist. 1994). Moreover, while Commission orders are final when entered, those orders are not effective or "operative" until 20 days after the orders have been served upon all parties. 220 ILCS 5/10-110. As a result, Petitioners' claim that "it would be arbitrary and capricious for the Commission to change its policy" is simply incorrect as a matter of law because there was no such Commission policy in place at the time Petitioners filed their case. Petitioners' Initial Brief, at 2.

Second, even if we were to *assume* that the Commission had somehow established the purported "policy" Petitioners articulate, Petitioners' argument is still overbroad. The very case law Petitioners cite in support regarding administrative agency departures from prior precedent indicates that that the prior precedent at issue must be "long-standing." Gatica v. Dept. of Public Aid, 98 Ill. App. 3d 101, 106-07, 423 N.E.2d 1292, 1296-97 (1st Dist. 1981) (remanding the case to the agency to determine whether the agency had a custom or practice and did not adhere to it where the plaintiff claimed that the agency departed "from custom" and the record was "replete with suggestion[s] that" the agency had such a custom). See Central Ill. Public Service Co. v. Pollution Control Bd., 165 Ill. App. 3d 354, 518 N.E.2d 1354 (4th Dist. 1988) (citing Gatica for the proposition that "administrative agencies are bound by their *long-standing* policies and customs of which affected parties had prior knowledge") (emphasis added). Staff's previous discussion of the procedural history of the first five WLNP cases and Petitioners' cases shows that any purported "precedent" is of recent origin, and can hardly be deemed "long-standing."

Finally, Petitioners' argument is unpersuasive because Illinois courts have long held that the Commission has the power "to deal freely with each situation as it comes before it, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding."

Peoples Gas, Light and Coke Co. v. Illinois Commerce Comm'n, 175 Ill. App. 3d 39, 51, 529 N.E.2d 671, 679 (1st Dist. 1988) (collecting cases).

Accordingly, it is Staff's position that the Commission should simply ignore Petitioners' Initial Brief to the extent that it argues that Petitioners' justifiably relied upon the Commission's "precedent" in the first five WLNP cases, and the Commission is bound to hew to that "precedent" in the above-captioned matters. With that said, Staff nonetheless requests that the Commission grant Petitioners temporary suspensions from the federal WLNP requirement under Sections 251(f)(2)(A)(i) and 251(f)(2)(B) of the Federal Act because Petitioners have met their burden of proof. 47 U.S.C. § 251(f)(2)(A)(i); 47 U.S.C. § 251(f)(2)(B).

Respectfully submitted,

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